No. 1232

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on March 4, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 32–38) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether Congressional use of the phrase "just compensation", in a statute authorizing a lease of Government land for the construction of a hotel and payment to the lessee at the termination of the lease for buildings constructed by him upon the land, empowered the Court of Claims to include in its judgment interest from the date of the agreed termination of the lease despite the provisions of Section 177 (a) of the Judicial Code.

STATUTES INVOLVED

1. The Military Academy Appropriation Act, 1921 (Act of March 30, 1920, 41 Stat. 538, 548), provides:

> That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease.

2. The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

STATEMENT

Pursuant to authorization contained in the Act of March 30, 1920, *supra,* the Secretary of War on October 17, 1924, leased a tract of land within the West Point Military Reservation to one Herbert Williams for the purpose of having a hotel constructed and operated on the land thus leased. The lease was for a term of 50 years from October 17, 1924, and was made in consideration of one dollar (R. 6, 22). Williams agreed to erect a hotel and all other necessary buildings in connection therewith, in accordance with plans which he had submitted with his bid for the lease, and subject to approval of final plans and specifications by the Superintendent of the Military Academy and by the Secretary of War (R. 22). The lease provided that the title to such buildings should remain in the lessee until the expiration of the term or until cancellation by the Secretary of War in the manner provided in the lease, and that, on such termination, title to the buildings should pass at once to the United States subject to the provisions for the payment of just compensation by the United

States (R. 22–23). The lease further provided that just compensation would be made to Williams, on termination, for the "* * * construction of said hotel appurtenances and equipments which may then be upon the demised premises." (R. 23).[1] Williams' main undertakings were to begin construction within six months and to complete the hotel within two years thereafter (R. 6); to furnish protective bonds against liens (R. 7); to establish approved standard rates for rooms and meals, with certain discounts to specified classes of persons (R. 7); to provide fire, liability and compensation insurance (R. 8); to restore or repair buildings damaged by fire (R. 8); and to operate the hotel at all times during the continuance of the lease. (R. 8–9).

In addition to the lease of land to Williams for one dollar ground rent with "just compensation" at termination, the Secretary of War agreed to furnish the hotel with electricity for light and power at the same price paid by the Quartermaster Department to the Military Academy (R. 9); to furnish the hotel water supply at cost (R. 9–10); to permit the hotel to obtain surplus ice from ponds on the Military Reservation (R. 9); and to allow the hotel to utilize the Academy

[1] The Act of March 30, 1920, *supra*, provided for just compensation to the lessee for "* * * the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease." (R. 22).

sewerage system without charge (R. 10). Other minor concessions were made (R. 9–10).

Williams assigned the lease to the Thayer-West Point Hotel Corporation, a corporation organized under the laws of New York on March 20, 1925, which constructed and completed a hotel within the time required by the lease (R. 24, 22). Prior to the completion of construction, on August 1, 1925, the corporation conveyed the lease and the corporation's interest therein, together with the corporation's right, title or interest to any building placed on the land covered by the lease, personal property used therein, and all compensation to become due upon the termination of the lease, to trustees under an indenture which secured bonds in the aggregate amount of one million dollars issued by the corporation to finance construction (R. 24).[2]

The corporation took possession of the hotel buildings in June, 1925, prior to completion, and operated the hotel thereafter under the terms of the lease until approximately January 17, 1929 (R. 24–25). On August 8, 1927, the corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York (R. 25) and, in a foreclosure action brought by the first mortgage trustees in the New York Su-

[2] On April 1, 1927, the corporation entered into a second mortgage arrangement to secure a $500,000 issue of bonds (R. 24).

preme Court, a judgment was entered on January 17, 1929, which ordered the sale of the property described in the first mortgage (R. 25).[3] The leasehold estate and other properties covered by the first mortgage were sold on July 8, 1930, at a public foreclosure sale to a committee acting on behalf of certain holders of the corporation's mortgage bonds (R. 25). The sale price was $25,000 and a deficiency judgment of $1,235,067.67 was entered against the corporation (R. 25). The bondholders' committee, pursuant to a plan of reorganization, assigned the interest acquired at the foreclosure sale to the respondent herein, The Thayer-West Point Hotel Company, a corporation organized under the laws of Delaware on November 7, 1930 (R. 22, 25–26). First mortgage bondholders of the original corporation surrendered bonds to the extent of $879,400 face value of the one million dollars issued, and received, in exchange, $439,700 face value of bonds issued by respondent, and shares of no-par stock (R. 25–26).[4] Such bonds and common stock are presently outstanding (R. 26). Respondent also mortgaged the leasehold estate and other hotel property for $125,000.00 (R. 26).

[3] The Court of Claims found that the property here involved, by reason of the first lien and foreclosure proceedings in the State court, was never administered by the trustee in bankruptcy, and that no dividend was ever paid in the bankruptcy proceeding to any creditor of the corporation (R. 25).

[4] Holders of the remaining first mortgage bonds received proportionate distributive shares from the proceeds of the $25,000 paid at the foreclosure sale (R. 26).

This mortgage indebtedness is presently outstanding in the principal amount of $115,000.00, with unpaid interest at 6 per cent from January 1, 1942 (R. 26).

On December 26, 1930, the referee appointed by the state court in the foreclosure proceeding delivered to respondent a deed conveying the leasehold estate and other property covered by the sale (R. 26). Shortly thereafter, the respondent obtained quitclaim deeds from the trustee in bankruptcy of the original corporation, the trustees under the second mortgage, and the trustee of the first mortgage (R. 26). On December 22, 1930, the Superintendent of the Military Academy gave written approval "* * * of the assignment of the lease. * * *" (R. 26.) Respondent took possession of the hotel on January 1, 1931 and operated it under the terms of the lease until March 10, 1943 (R. 27).

On January 5, 1943, respondent suggested to the Secretary of War, by letter, that conditions then existing made the operation of the hotel impossible and that the hotel might have to be closed (R. 27). Respondent stated that, if the hotel fell into the hands of outside interests, the bondholders would be deprived of any return on their original investment, and that the operation of the hotel might then be conducted to the detriment of the officers and cadets of the Academy and their guests (R. 27). The solution of this

problem urged by respondent was government ownership and operation of the hotel (R. 27). Respondent, accordingly, requested that the Secretary of War declare the lease forfeited, in accordance with its provisions (R. 27–28). The occasion for the forfeit was to be a default by the respondent, namely, the closing of the hotel (R. 28). Respondent finally stated in the letter of January 5, 1943 that its "* * * holdings and the value thereof depend[ed] upon a contract * * *" and that if the method of cancellation provided in the lease were followed, just compensation to the lessee would be available to profect it (R. 27–28). Details of the forfeiture of the lease were worked out (R. 28, 29) and the hotel was closed by respondent on March 10, 1943, on which day it was taken over by agents of the Secretary of War (R. 29).

On April 19, 1943, respondent wrote to the Secretary of War with regard to just compensation under the lease and fixed the tentative amount at $2,300,000.00 (R. 30). On May 19, 1943 this action was instituted by respondent in the court below (R. 1). The complaint alleged that no reply had been made by the Secretary of War to its request for just compensation in the amount of $2,300,000.00 and prayed for judgment in the sum of $1,932,000.00 (R. 5).[5]

[5] On May 21, 1943, the Secretary of War answered respondent's letter of April 19 stating that the tentative amount of $2,300,000.00 appeared far in excess of the prop-

The court below found the fair and reasonable original cost of constructing the hotel and its appurtenances to be approximately $1,300,000.00 (R. 30).[5] The court below further found that the reproduction cost as of March 10, 1943, would have been $1,138,160.00 without landscaping or financing costs (R. 31). The court below then concluded that, considering "* * * all relevant facts and circumstances * * *", the fair and reasonable value of the hotel as of March 10, 1943 was $820,682.00 (R. 31–32). To this amount was added the fair and reasonable value of the hotel equipment, giving a total of $867,682.00 (R. 32). To this total, the court below added interest at 4 percent from March 10, 1943, as an addition necessary to constitute "* * * just compensation as of the date of payment * * *" (R. 32).

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erty's reasonable value and that it would be necessary to have the matter determined in court (R. 30).

[5] In connection with this finding, the court below also found that the books of original entry covering cost of construction had been destroyed on or about February 25, 1938, by the attorneys for the trustee in the bankruptcy proceedings mentioned above (R. 30). In its opinion, the court below stated, after referring to the destruction of the original books of entry, that the evidence surviving as to actual original cost of construction was in general "* * * too fragmentary, indefinite, and otherwise unreliable to warrant definite findings * * *" (R. 36). The findings of an original cost of $1,300,000.00 which the court below, nevertheless made, was characterized "* * * as approximate only * * *" (R. 36).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest on this claim against the United States prior to the time of rendition of its judgment.

2. In holding that the use of the words "just compensation" in the Act of March 30, 1920, *supra*, called for the same assessment of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act of March 30, 1920, *supra*, authorized it to award interest prior to the date of its judgment.

4. In including in its judgment interest on the claim.

REASONS FOR GRANTING THE WRIT

1. Section 177 (a) of the Judicial Code expressly prohibits the allowance of interest by the Court of Claims prior to the date of that court's judgment unless the claim is founded on a contract which expressly stipulates for the payment of interest. The decision of the Court of Claims herein, in awarding interest to respondent, is in direct disregard of this statutory prohibition and in conflict with the principle of numerous decisions of this Court. *United States* v. *Goltra*, 312 U. S. 203; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v.

Verdier, 164 U. S. 213, 216; *Tillson* v. *United States,* 100 U. S. 43.

The opinion of the court below gives superficial recognition to the provisions of Section 177 (a) but seeks to overcome the statutory bar by characterizing the interest awarded, in its judgment, as "* * * not * * * interest but * * * part of just compensation." (R. 38). Thus, the court below has attempted to create a verbal formula to remove its action from the ambit of Section 177 (a) and to place it under rules applicable solely to damage awards appropriate in eminent domain or requisition cases under the Fifth Amendment. Concededly, an award of damages under the Fifth Amendment for a taking of property includes interest from the date of the taking if payment be delayed. *Jacobs* v. *United States,* 290 U. S. 13; *Phelps* v. *United States,* 274 U. S. 341. But the essential element which justifies the use of this measure of damages is the existence of an actual taking. *United States* v. *Goltra, supra,* at p. 208; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *Phelps* v. *United States, supra,* at p. 344; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 305. Here, as the court below expressly recognized, the suit "* * * is on a contract and not for compensation under the Fifth Amendment. * * *." (R. 37). There is no element of taking or eminent domain in this

case.[7] Absent such a taking, nothing short of express language by Congress or an express contract stipulation within the meaning of Section 177 (a) suffices to validate an award of interest by the court below. *United States* v. *Goltra, supra; Boston Sand Co.* v. *United States,* 278 U. S. 41; *Tillson* v. *United States, supra.* There is no express provision in the appropriation act here involved, (the Act of March 30, 1920) with regard to payment of interest. See 7 Op. A. G. 523, 525. Nor is there anything in the legislative history of the statute to indicate that Congress intended the "just compensation" authorized therein to constitute more than a provision whereby the lessee might "* * * have a fair opportunity at least * * *" to recoup on his investment at the expiration of the term of the lease. 59 Cong. Rec. 3032; see also 59 Cong. Rec. 3031; H. Rep. No. 620, 66th Cong., 2d sess.; H. Rep. No. 754, 66th Cong., 2d sess. And there is no contract provision here involved giving any greater right in respect of interest than the stat-

[7] On May 20, 1943, the day after the instant case was commenced, the United States filed a condemnation suit for the property here involved, in the United States District Court for the Southern District of New York. On February 7, 1944, an order was entered in that action staying all further proceedings therein, pending final disposition of the case in the Court of Claims (R. 30). Whether that suit was maintainable in the light of the contract here involved is now a moot question. In any event, if there had been a taking of respondent's property by eminent domain, it would have had to be accomplished in that suit and not by contract.

ute conferred. The contract itself merely attempted to reproduce the terms of the statute.[8] Accordingly, we submit that the emphasis of the court below on the words "just compensation" contained in the Act of March 30, 1920, *supra*, and in the lease upon which the suit was based is not sufficient to avoid the provisions of Section 177 (a) of the Judicial Code and leads to a result which is in direct conflict with the decision of this Court in *United States* v. *Goltra*, 312 U. S. 203.

2. The question presented is one of importance. The decision herein underscores a tendency by the court below to attempt to overcome Section 177 (a) and to grant interest whenever, in its opinion, such interest should be included in its judgment.[9] We submit that Section 177 (a) and

[8] As the court below noted, the lease does not follow the exact wording of the Act of March 30, 1920, *supra*, in providing for just compensation (R. 36). The statute provides that the lease "* * * shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid * * * at the termination of said lease." (R. 22.) The lease provides that "* * * just compensation shall be made * * * for the construction of said hotel appurtenances and equipments which may then be upon the demised premises." (R. 23). We do not believe that the minor difference in wording has any significance for the issue here presented. In any event, the lease could not create any higher liability than that authorized by the Act of March 30, 1920, *supra*.

[9] An illustration of this tendency, without any attempt at justification, is contained in the opinion of the Court of Claims in *N. Y. Rayon Importing Co., Inc.* (#2) *et al.* v. *United States*, Court of Claims Docket No. 45861, decided February 4, 1946. A petition for a writ of certiorari has also been filed by the Government in that case, No. 1181, this Term.

the controlling decisions of this court may not be thus disregarded, nor should the court below be permitted to establish a waiver of governmental immunity going beyond the scope permitted by Congress. From the standpoint of governmental finance, the importance of the review sought herein is obviously very great.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MAY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946